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In The Supreme Court of the United States

MARY HALE, ET AL.,

Petitioners,

v.

BEXAR COUNTY, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Petitioners' claim for a more expeditious rescue states a cause of action under the theory of the "state-created danger" exception of the Due Process Clause as guaranteed by the Fourteenth Amendment?

Whether Petitioners Jennifer and Harold Harris and Darrell Scraper, as volunteer firemen, possess a Constitutional right under the Fourteenth Amendment to by-pass Command Control and attempt a rogue rescue.

PARTIES TO THE PROCEEDING

Respondents:

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Petitioners:

Mary Hale, Wayne Hale, Jennifer Harris, Harold Harris and Darrell Scraper, by and through their attorney of record, Philip M. Ross, Attorney at Law, 1006 Holbrook Road, San Antonio, Texas 78218.

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JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that a review on a writ of certiorari is not a matter of right but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. Compelling reasons are indicated if the decision leading to the petition contributes to a conflict of authority between the Courts of Appeals or State Courts of last resort; reflects a departure from the usual course of proceedings; or presents an important question of federal law that has not been but should be settled by this Court.

Petitioners have not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction. The legal principal of the case subjudice was enunciated by this Court in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S.

189 (1989), therefore, there is no conflict of authority which should be settled by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV §1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983.

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects or causes to be subjected, any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding. . . ."

STATEMENT OF THE CASE

The case at bar concerns the question of whether or not Respondent Governmental Entity Bexar County can be held liable under the Due Process Clause for a rescue of the petitioners that was not as expeditious as desired by petitioners. This Court has previously enunciated the rule of law:

> But nothing in the language of the Due Process Clause itself requires the state to protect the life, liberty and property of its citizens against invasion by private actors. The clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the state itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text . . . the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing its power" or employing it as an instrument of oppression. . . . its purpose was to protect the people from the state, not to insure that the state protected them from each other. The framers were content to lead the extent of governmental obligation in the latter area to the democratic political process.

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 196 (1989).

Petitioners Mary Hale and Wayne Hale were rescued from the Chlorine gas spill caused by third party Union Pacific Railroad. Petitioners' allegations that they were not rescued as expeditiously as desired does not state a cause of action under the state-created danger exception to the Due Process Clause. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Neither do the volunteer firefighters possess a constitutional right under the Fourteenth Amendment to by-pass Command Control and attempt a rogue rescue. Respondent asserts that there is no compelling reason for this court to readdress this issue.

I. Petitioners Rescued.

On June 28, 2004, a Union Pacific train and a Burlington Northern train collided causing Chlorine Gas to envelope the area with invisible pockets of death. The train derailment occurred at approximately 5:00 a.m. and was a couple of hundred yards from petitioners' residence. Law enforcement and emergency responders from Bexar County, the City of San Antonio and other surrounding agencies responded to the event. In accordance with the Bexar County Emergency Management Plan, the mutual aide agreement among local governmental agencies and the National Incident Management System

protocols and procedures, Bexar County determined that the San Antonio Fire Department would be the exclusive agency to approach the accident site and attempt rescue. This was accomplished through the establishment of a Command Control Center. Ultimately, petitioners were rescued at approximately 11:30 a.m.

II. Nascent Volunteers Go Rogue.

The Volunteer Petitioners, husband and wife tandem team Harold and Jennifer Harris, along with Darrell Scraper, were prevented from entering the toxic cloud area by Sergeant Coleman of the Bexar County Sheriff's Department pursuant to Command Control instruction. The well-intentioned volunteers opined that they could drive a truck through a cornfield to conduct a rescue of the Hales. These nascent volunteers intended to conduct the rescue without any appropriate materials, suits or other appropriate equipment. The Volunteer Petitioners' rogue intentions at rescue are not constitutionally protected under the Due Process Clause of the Fourteenth Amendment.

III. Sergeant Coleman's Qualified Immunity.

Sergeant Coleman of the Bexar County Sheriff's Department, pursuant to Command Control instructions prevented the nascent volunteers' rogue attempt at rescue. On March 21, 2007, the Honorable United States District Judge Royal Furgeson granted

Sergeant Coleman's Motion to Dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P. The trial court reasoned that the petitioners failed to allege a constitutional deprivation. This ruling was not preserved by petitioners either at the Fifth Circuit Court of Appeals nor in this Court on Petitioners' Writ for Certiorari and is therefore, waived.

IV. Summary Judgment.

On July 30, 2008, the Honorable Royal Furgeson granted Respondent Bexar County's Motion for Summary Judgment and entered Final Judgment in the case. (See, App. 1). The Trial Court reasoned that the petitioners had failed to allege a constitutional deprivation of municipal liability under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) and held that the Respondent could not be held liable under Section 1983 where there was no constitutional deprivation at the hand of the individual officer in question under *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

V. Fifth Circuit Affirms.

On July 27, 2009, the Fifth Circuit affirmed the Trial Court's granting of summary judgment to Respondent Bexar County. On August 24, 2009, the Fifth Circuit Court of Appeals denied Petitioners' Motion for Rehearing En Banc.

REASONS FOR DENYING WRIT OF CERTIORARI

I. No Constitutional Deprivation.

Petitioners have failed to state a constitutional deprivation under the state-created danger theory of the Due Process Clause, as a matter of law. The Due Process Clause generally confers no affirmative right to governmental aide, even where such aide may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989); *Youngberg v. Romeo,* 475 U.S. 307, 317 (1982). " . . . Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference. . . . it does not confer an entitlement to such governmental aide as may be necessary to realize all the advantages of that freedom." *Harris v. McRae,* 448 U.S. 297, 317 (1980). As a general matter, then, the state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 197 (1989).

Several circuits have carved two exceptions to this general rule in instances where the state is obligated to aide or protect an individual from further danger pursuant to a "special relationship":

(1) The custody exception; and,

(2) The state-created danger exception.

Jackson v. Schultz, 429 F.3d 586, 590 (6th Cir. 2005). For the purposes of this petition, the state-created danger exception has been raised.

Although never specifically adopted by this Court, the state-created danger exception applies where the state causes or greatly increases the risk of harm to its citizens without due process of law through its own affirmative acts. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998). To establish liability under the state-created danger theory, a petitioner must show: (1) affirmative acts by the state that create or increase the risk that an individual will be exposed to private acts of violence; (2) that the state's actions placed the victim specifically at risk as distinguished from the risk that affects the public at large; and (3) that the state knew or clearly should have known that its actions specifically endangered an individual.

The state-created danger theory does not apply in the case at bar since the Respondent's actions did not expose the petitioners to private acts of violence as required by the first prong, nor did the Respondent know or clearly should have known that their actions specifically endangered the petitioners.

II. Fifth Circuit.

The seminal case in the Fifth Circuit concerning rescue efforts vis-à-vis the Due Process Clause is *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992). In *Salas*, the estate of a hostage killed by a gunman

during a confrontation sued the County and the Sheriff individually asserting due process violations for the handling of the hostage situation. Sheriff Carpenter came upon a hostage situation at the County Courthouse where police department SWAT members had been dispatched to a hostage situation. Sheriff Carpenter demanded that the police officers leave claiming that courthouse security was within his exclusive jurisdiction and replaced the trained SWAT personnel with County Deputies to conduct the negotiations. The Sheriff's Department did not have a SWAT team and lacked a hostage negotiation policy. Ultimately, the hostage taker killed the hostage and himself during the standoff. Plaintiffs' claims focused on Sheriff Carpenter's decision to prevent the Ft. Worth Police Department SWAT team from effectuating the release of the hostage. The Fifth Circuit held that the Due Process Clause was not implicated by the negligent act of an official which caused unintended loss or injury to life, liberty or property, citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

III. Other Circuits.

Petitioners champion their argument of state-created danger by specific reliance on the Eighth and Eleventh Circuit Courts of Appeals. Respondent asserts that this reliance is misplaced and petitioners' argument vacuous.

A. Eighth Circuit.

In *Avalos v. City of Glenwood*, 382 F.3d 792 (8th Cir. 2004), the Eighth Circuit addressed a claim of state-created danger in the context of the husband of a confidential informant who was encouraged by police officers to take the law into his own hands which resulted in the shooting of the plaintiff. The Court held that there was no due process violation under the theory of state-created danger reasoning as follows:

> The due process clause's guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm and does not transform every tort committed by a state actor into a constitutional violation. *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998). The test to ascertain a valid substantive due process violation is "whether the behavior of the governmental official is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscious." Under the state-created danger theory, plaintiff must prove (1) they were a member of a limited, precisely definable group; (2) defendant's conduct put plaintiff at a significant risk of serious, immediate and proximate harm; (3) the risk was obvious or known to the defendant; (4) defendant acted recklessly in conscious disregard of the risk; and, (5) defendant's conduct shocks the conscious.

The facts in the case at bar do not establish a state-created danger theory under the Eighth Circuit, as a matter of law. The Eighth Circuit is not in conflict.

B. Eleventh Circuit.

In *Waddell v. Henry County Sheriff's Office*, 329 F.3d 1300 (11th Cir. 2003), the Court refused to adopt the state-created danger theory in the context of a county jail inmate being released to work as a confidential informant in a county vehicle with a known propensity for driving while drunk. The inmate was responsible for an automobile collision wherein plaintiff's decedent was fatally injured. The Eleventh Circuit Court of Appeals affirmed the trial court's granting of defendant's motion for summary judgment holding that the plaintiffs had failed to state a violation of substantive due process.

Pellucidly, the Court recognized that the Eleventh Circuit had in the past recognized the theory of state-created danger in *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989), a case which petitioners in the case at bar heavily rely. However, the Court noted in *White v. Lemacks,* 183 F.3d 1253, 1257 (11th Cir. 1999) that the Court had concluded that the state-created danger theory had been superseded by the standard employed by the Supreme Court in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992). Thus, under the Eleventh Circuit standard, conduct by a government

actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscious shocking in a constitutional sense. The Eleventh Circuit has not adopted the state-created danger theory, but rather relies on this Court's precedent in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). The Eleventh Circuit is not in conflict.

C. Third Circuit.

In *Schieber v. City of Philadelphia*, 320 F.3d 409 (3rd Cir. 2003), the Third Circuit Court of Appeals addressed a fact scenario which is a paradigm to the case at bar. In *Schieber*, plaintiff's decedent was murdered inside her apartment. Earlier in the evening, apartment neighbors had called 9-1-1 to report a domestic disturbance, reporting that a female was screaming and being choked in a violent disturbance. Officers responded to the scene, knocked on the apartment door, but received no response. The officers made the discretionary decision not to force the door open and restrained the neighbors from gaining forcible entry. The officers told the neighbors not to attempt forcible entry and informed them to call 9-1-1 if they heard any further disturbance.

The District Court denied the officers' motion for summary judgment concluding that there was a material fact as to whether or not the officers greatly increased the risk of harm to plaintiff's decedent by preventing the neighbors from effectuating the rescue

themselves under the state-created danger theory. The Third Circuit Court of Appeals reversed the trial court's denial of summary judgment and rendered judgment for the officers. The Third Circuit noted that the trial court had relied on the previous precedent of *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996) (as the petitioners in the case at bar have relied) but the Third Circuit Court of Appeals further noted that the *Kneipp* decision needed to be updated in light of this Court's subsequent decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). The Court accordingly concluded that to prove a violation of substantive due process in cases involving executive action, the plaintiff must show that the state acted in a manner that "shocks the conscious". To generate liability, executive action must be so ill conceived or malicious that it shocks the conscious. The Court held that the officers' actions in restraining the neighbors from their attempted rescue was not a violation of the plaintiffs' substantive due process right. The Third Circuit Court of Appeals is not in conflict.

D. Sixth Circuit.

In *Tanner v. County of Lenawee*, 452 F.3d 472 (6th Cir. 2006), the Sixth Circuit affirmed the granting of summary judgment for the defendants in an alleged state-created danger scenario. In *Tanner*, plaintiffs were shooting victims arising from a home invasion conducted by a brother-in-law in rural Michigan. The plaintiffs fortunately survived their gunshot wounds but brought suit against the county

emergency response team for the method in which it responded to the emergency. Plaintiffs complained that the emergency responders were not rapid enough and complained that by setting up a perimeter around the house, they cut off potentially lifesaving rescue efforts allegedly violating their substantive due process rights under the state-created danger exception. However, the Sixth Circuit affirmed the trial court's granting of summary judgment holding that the defendants were not liable under the state-created danger exception. The Court reasoned that the state-created danger exception has never been extended to cover situations where police respond to a 9-1-1 call and set up a perimeter in an emergency situation.

The *Tanner* case is not unlike the case at bar in that emergency responders were dispatched to a 9-1-1 call and set up a perimeter by Command Control. Both the Tanners and the Hales were rescued by emergency responders and neither met their burden of establishing an exception under the state-created danger theory. The Sixth Circuit is not in conflict.

E. First Circuit.

In *Rivera v. State of Rhode Island*, 402 F.3d 27 (1st Cir. 2005), the First Circuit Court of Appeals affirmed the trial court's summary judgment for the defendants in a state-created danger theory case. In *Rivera*, the decedent's estate sued under Section 1983 against the state who had promised to protect the

decedent who was a murder witness in a criminal trial. Although the state failed in its promise to protect the murder witness, the Court held that the state action was not conscious shocking under the standard of *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). The Court noted that although the First Circuit had discussed the state-created danger theory it had never found it actionable under the facts alleged in any particular case. The Court reasoned that the state action must be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscious. The *Rivera* facts did not rise to this level. The First Circuit is not in conflict.

IV. No State-Created Danger.

The fact scenario presented by petitioners simply does not fit any judicially recognized definition of state-created danger in any circuit. Petitioners were exposed to a danger created by a train collision, not attributable to any state action. As a result of the train collision, petitioners were exposed to spewing Chlorine gas creating invisible pockets of death throughout the area. In accordance with the Bexar County Emergency Plan and the National Incident Management System Protocols and Procedures, it was determined that the San Antonio Fire Department Hazardous Materials Team would be the exclusive agency to approach the accident site and attempt rescue.

Petitioners were rescued by the San Antonio Fire Department Hazardous Materials Team, albeit not as rapidly as petitioners desired. The San Antonio Fire Department Hazardous Materials Team was the "provider of an alternative" for the purposes of the rescue made the basis of this case. The well-intentioned volunteer husband and wife duo of Jennifer and Harold Harris together with Darrell Scraper were prevented from using their truck to drive through a cornfield without hazardous material suits in contravention to Command Control. Petitioners do not possess a constitutional right to contravene Command Control to commence their own quixotic rescue.

Petitioners fact scenario simply does not meet this Court's standard of "shocks the conscious" test enunciated in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) as is required to state a violation of substantive due process, as a matter of law.

V. Waiver.

The anfractuous procedural history of this case provides further reason for denial of Petitioners' Writ for Certiorari. The nascent Volunteer Petitioners waived their First Amendment argument before the Fifth Circuit Court of Appeals by inadequate briefing. These same Volunteer Petitioners have waived the remainder of their Fourteenth Amendment argument based on lack of briefing in their Petition for Writ of Certiorari.

The Hale Petitioners' argument on state-created danger fails for a myriad of reasons, not the least of which are the factual elements of the case. Petitioners' failure to appeal Sergeant Coleman's dismissal, the only Bexar County employee sued, a fortiori defeats any claim against Bexar County, as a matter of law. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam).

VI. No *Monell* Violation.

As the United States District Court Judge Royal Furgeson held in granting Respondent Bexar County's motion for summary judgment, petitioners fail to show that Bexar County was the moving force behind Plaintiffs' constitutional rights violation because there was no underlying violation. Petitioners failed to establish a custom or policy on behalf of Bexar County that was a direct proximate cause of any constitutional violation and therefore, the petition for writ of certiorari should be denied. *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397 (1997).

CONCLUSION

Petitioners failed to assert a state-created danger theory based on the fact scenario of the case subjudice. Petitioners were rescued and the manner in which they were rescued does not shock the conscious as was required under *County of Sacramento v.*

Lewis, 523 U.S. 833 (1998). Respondent requests that Petitioners' Writ for Certiorari be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARY HALE, WAYNE HALE, JENNIFER HARRIS, HAROLD HARRIS, and DARRELL SCRAPER, Plaintiffs,	§	**No. SA-06-CA-0562-RF**
v.	§	
BEXAR COUNTY, TEXAS, Defendant.	§	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Jul. 30, 2008)

BEFORE THE COURT are Defendant Bexar County's ("Bexar County") Motion for Summary Judgment (Docket No. 66), filed May 8, 2008; Plaintiffs' Response (Docket No. 67), filed May 16, 2008; and Bexar County's Reply (Docket No. 68), filed May 27, 2008. The Court held a hearing on this matter on July 15, 2008. After careful consideration, of the briefs, the arguments made in open court, and the applicable law, the Court is of the opinion that the Motion for Summary Judgment (Docket No. 66) should be GRANTED.

Introduction

This case involves a tragic train derailment that resulted in the death and injury of residents in the nearby area. Both Bexar County and volunteer officials arrived on scene to assist during the emergency. Plaintiffs allege Bexar County prevented attempted rescue efforts, which could have limited their injury and prevented death. Previously this Court dismissed claims against Defendant Coleman based on qualified immunity. The Court found that Plaintiffs failed to state a claim for a violation of a clearly established constitutional right. Bexar County now moves for summary judgment arguing that there can be no award of damages against a municipality when the actions of its officer did not inflict constitutional harm. After reviewing the previous ruling on this matter, the Court finds that because no underlying constitutional violation was committed, there can be no municipal liability. Accordingly, the Motion for Summary Judgment is granted.

Factual and Procedural Background

At 5:00 a.m. on June 28, 2004, a train carrying chlorine gas derailed near the home of Plaintiffs Wayne and Mary Hale (collectively the "Hales"). *Third Am. Compl.*, at 3. A Union Pacific train collided with a Burlington Northern train where Nelson road crosses the train tracks in southwest Bexar County. *Id.* at 5. The train derailment was within a couple hundred yards of the Hale's house. *Id.* The Hales

were awakened by the sound of the derailment and the overwhelming smell of the concentrated chlorine gas. *Id.* Alarmed by the noise, Mary Hale reported the crash to a Bexar County 911 operator, who notified the Southwest Volunteer Fire Department ("SWFD"). *Id.* at 4. The dispatcher contacted the appropriate authorities about the Hales' claim that there was smoke and that they were having trouble breathing, but failed to mention anything about a train derailment. *Id.* The incident was within the jurisdiction of SWFD, and outside the city limits of the City of San Antonio. *Id.* at 3. Accordingly, the Bexar County dispatcher called the SWFD and Plaintiffs Harold and Jenniefer [sic] Harris in their capacities as assistant chief and lieutenant, respectively, were dispatched to the scene. *Id.* at 4. The Harrises reached the scene at 5:15 a.m, followed by deputies from the Bexar County Sheriff's Office ("BCSO") (dispatched to assist SWFD), and SWFD Chief Darrell Scraper. *Id.* at 4-7.

As they approached in early morning darkness, not yet aware that they were responding to a train derailment, a BCSO patrol unit and a SWFD motor unit drove into a cloud of chlorine gas. *Id.* at 5. The gas was leaking from a ruptured tank car on the Union Pacific train. *Id.* The two lead vehicles were overcome by gas, and the sheriff's deputy was able to back his vehicle out and escape. *Id.* at 5. However, an injured firefighter became incapacitated and was rescued by SWFD Chief Harris. *Id.* Harris requested aid from Jarrett Fire Department ("JFD") and

Geronimo Village Fire Department ("GVFD"), and requested an ambulance. *Id.*

After the injured firefighter was transported for further medical treatment, the SWFD rescuers put on their bunker gear and self-contained breathing apparatus, which provided limited protection from the leaking chlorine gas, and returned to the scene pursuant to national, state, and local protocols for hazardous locations. *Id.* at 5-6. Within an hour of the collision and derailment, the Bexar County dispatcher advised SWFD and BCSO of the chlorine cargo on the Union Pacific train and the wind direction. *Id.* at 6. A BSCO sergeant instructed all BCSO units to stay clear of the scene. *Id.*

Meanwhile, around 6:00 a.m., Mary Hale made another call to 911, reporting that she, her husband, and her brother-in-law were having serious trouble breathing and were attempting to evacuate in their vehicle. *Id.* at 6. Mary Hale informed dispatch that their access to Nelson Road was blocked by a neighbor's locked gate, which prevented them from driving their vehicle or even walking to the vicinity of the Nelson Road bridge. *Id.* They returned home. *Id.* Plaintiffs allege that Bexar County officials knew of the private gate that obstructed their exit because it had been the subject of a newspaper article and County officials regarded it as a public nuisance and were considering legal action. *Id.* However, the gate remained intact at the time of the train wreck. *Id.*

Chief Scraper arrived at the scene around 6:00 a.m. and established a forward command position, while Harris retained his authority as incident commander. San Antonio Fire Department ("SAFD") personnel began arriving on the scene and were briefed by SWFD. *Id.* at 7. Around 6:15 a.m. Harris and SWFD Capt. Nolen found and rescued the Union Pacific train engineer, carried him east on Nelson Road away from the wreckage for about ten minutes, and waited for a SWFD rescue vehicle. *Id.* The two rescuers, still in their bunker gear, returned to the wreckage to search for the missing train conductor. *Id.*

Around 6:30 a.m. BCFA notified SWFD that nearby residents, including the Hales, were trapped at 9281 Nelson Road. *Id.* at 7. (This was an isolated segment of Nelson Road across from the wreckage. *Id.*) Both groups discussed options for rescuing the Hales and SWFD, equipped with bunker gear and self-contained breathing apparatuses, prepared to approach the Hales' residence through a cornfield, upwind from the spill. *Id.* At 7:00 a.m. Harris and Nolen further investigated the wreckage and crossed under the train on foot, heading east upwind, looking for a safe rescue approach. *Id.* at 7-8. Chief Scraper instructed the rescuers to take their Motor 3 truck to initiate the rescue, possibly by driving a short distance south down Pearsall Road and across a corn field, to approach the residences from the south side of the tracks – upwind from the chlorine contamination. *Id.* at 8. This attempt was thwarted by sheriff

deputies who would not let SWFD move their vehicle closer to the wreckage. *Id.*

By as late as 8:00 a.m., SAFD had not yet committed the city's HazMat team to the incident. *Id.* at 9. SWFD Chief Scraper and Harris had asserted their authority as incident commanders pursuant to the Local Emergency Planning Committee (LEPC), HAZMAT/WMD Contingency Plan, the Bexar County Emergency Management Plan (Annexes F & Q), and the mutual aid agreement among local governmental agencies, as well as National Incident Management System protocols and procedures. According to Plaintiffs, Bexar County disregarded SWFD's authority.

In accordance with Bexar County's interpretation of the Bexar County Emergency Management Plan (Annexes F & Q), the mutual aid agreement among local governmental agencies, as well as National Incident Management System protocols and procedures, Bexar County determined that SAFD would be the exclusive agency to approach the accident scene and attempt a rescue, concluding that no other rescuers, including county fire, would be allowed to attempt a rescue.

Meanwhile, Mary Hale was still in contact with the Bexar County dispatcher, and informed her that she and her husband were still in their vehicle trying to escape the chlorine cloud, but were unsuccessful because of the blocked road. *Id.* at 10. The Hales were still having serious trouble breathing. *Id.* The dispatcher maintained contact, indicated help was "on

the way," and advised the Hales to return to the house, "shelter in place," and turn off the air conditioning. *Id.* Ultimately, turning off the air conditioning worsened the situation. *Id.* Furthermore, returning to the house positioned the Hales closer to the chlorine spill and train derailment compared to the destination the Hales had reached while attempting to escape, which was closer to the safe zone. *Id.* Consequently, this subjected the Hales to more concentrated chlorine contamination and poisoning. *Id.* at 11.

Two hours after SWFD was prevented from initiating the Hales' rescue, the Hales were contacted by private rescuers by telephone. *Id.* At 8:30 a.m., private rescuers informed the Hales that they were on their way to the Hales's residence from the southeast. *Id.* Shortly thereafter, the private rescuers again contacted the Hales and informed them that sheriff's deputies blocked their rescue attempt under threat of arrest. *Id.*

Additionally, the Hales's son Charles, who was familiar with the area and had experience as a volunteer firefighter with Primrose Fire Department, was also denied the opportunity to make a rescue attempt. *Id.* Charles called 911 and informed the dispatcher that he could make the rescue; however, he was informed that he may get shot if he attempted the rescue. *Id.* at 12. After driving to the area, Charles could not get close enough to the house because sheriff's deputies blocked his access. *Id.*

After SWFD's attempts to use its Motor 3 vehicle to make a rescue from the southeast were blocked, Chief Harris requested Lt. Harris and GVFD fireman Yanelli find a way around the wreckage from the southeast to rescue the trapped residents. *Id.* at 13. Both Lt. Harris and Yanelli had basic HazMat training, and Harris had successfully rescued two victims from the wreckage. *Id.* Furthermore, Harris was familiar with the scene due to a recent rescue she had been involved with around the same area. *Id.*

SAFD committed its HazMat teams, which began arriving at the command site at 8:30 a.m., and prepared for a tactical entry through the wreckage at approximately 9:45 a.m. to search for the missing conductor – not the Hales. *Id.* at 14. Plaintiffs contend that this rescue attempt, through the wreckage, was unnecessarily dangerous, slow, and inefficient. *Id.*

Despite the fact that the only coordinated rescue attempt was aimed at the missing conductor, at approximately 9:10 a.m., Bexar County 911 staff advised the Hales by telephone to get into the shower for decontamination in preparation for *imminent evacuation.* Reluctantly, the Hales showered off, ultimately creating a chemical reaction with the chlorine gas in the house, producing hydrochloric acid, which allegedly resulted in further harm and injury. *Id.* at 14-15.

At this time, Lt. Harris and Yanelli drove their fire rescue truck along the county roads southwest of

the wreck, searching for a way to approach the isolated segment of Nelson Road, upwind of the wreckage, and away from the chemical hot zone. *Id.* at 15. The two rescuers were observed by the operator of BCSO Unit 2701, who contacted dispatch to see if BSCO had authorized any firemen to be on the back side of Nelson Road. *Id.* Lt. Kyle Coleman and another deputy (of the BSCO) stopped Harris and Yanelli, and ordered them out of the area. *Id.* While in their clearly marked SWFD rescue vehicle, the two rescuers attempted to identify themselves and explain their actions; however, the BSCO deputy continued to yell at them and ordered them to leave without an opportunity to show any credentials. *Id.* Although the rescuers objected to the interference, they complied due to fear of arrest. *Id.*

According to a partial transcript of BCSO radio communications prepared at the request of the National Transportation and Safety Board, at around 9:45 a.m., the operator of BSCO Unit 2701, Lt. Coleman was advised about the SWFD presence and authority to check homes and proceed along Nelson Road. *Id.* at 17. The BSCO operator of BSCO Unit 2004, Lt. Raul Fernandez informed Lt. Coleman that the SWFD Asst. Chief had sent firemen into the back side of Nelson Road to check on some homes, and noted that "it's their call, it's the county side." *Id.* at 17. Both Lt. Coleman and Lt. Fernandex [sic] were senior sheriff patrol supervisors in charge of operations at the accident. *Id.* Nevertheless, after being informed of SWFD's presence and apparent

jurisdiction, or at least authority to conduct their rescue efforts, Lt. Coleman responded "well, we just orderd [sic] them out of here, we've already took care of that, and we're not going to allow 'em back in here . . . until the fire command over there . . . tells us they can come back in." *Id.* Plaintiffs allege that the deputies were acting pursuant to an official decision to block anyone other than SAFD HazMat team from approaching the accident scene. *Id.* at 17.

The Harrises and Darrell Scraper allege that Lt. Coleman, a BCSO sergeant, ordered them to stay out of the area. *Id.* at 9. Similarly, the Hales allege that other private rescuers, such as their son, Charles, were prevented from attempting a rescue *Id.* at 11-12. Lt. Coleman denies these allegations. *Answer,* at 3-5.

When the Hales returned home, they again called 911 and followed instructions to turn off their air-conditioning and rinse in the shower (for decontamination) in preparation for rescue. *Third Am. Compl.*, at 33. Both actions increased the humidity inside their home, causing a chemical reaction which produced hydrochloric acid. *Id.* The 911 operator assured them that help was on the way, and advised them to stay put. *Id.* The Hales allege that they detrimentally relied on the operator, instead of continuing self-evacuation efforts or contacting private rescuers. *Id.* at 34.

SAFD finally reached the Hales at 11:30 a.m. *Id.* at 32-33. The Hales believe they could have been saved as early as 7:30 a.m. if Lt. Coleman and other

deputies had not interfered with SWFD. *Id.* They allege that, as a result of the delay, they suffered prolonged exposure to chlorine gas and hydrochloric acid. *Id.* at 33. When SAFD arrived, Mary Hale was almost unconscious and near death. *Id.* Her brother-in-law, who was living with the Hales at the time, died a few months later. Finally, Wayne Hale's mother and step-sister, who lived next door, were dead when help arrived. *Id.*

Plaintiffs contend this was an official county decision pursuant to an interpretation of LEPC, HazMat/WMD Contingency Plan, the Bexar County Emergency Management Plan (Annexes F & Q), and the mutual aid agreement among local governmental agencies as well as National Incident Management System protocols and procedures.

Claims

Plaintiffs Mary Hale and Wayne Hale (collectively "Plaintiffs") assert that Lt. Coleman acted pursuant to a policy, practice, or custom adopted by Bexar County that resulted in their constitutional rights being violated. Alternatively, Plaintiffs argue it was Bexar County's failure to adequately train and supervise law enforcement officers not to exceed their authority under the LEPC HAZMAT/WMD Contingency Plan, the Bexar County Emergency Management Plan, and the mutual aid agreement among local government agencies, that resulted in their constitutional rights being violated. *Id.* at 17, 39.

Bexar County asserts that it is entitled to Summary Judgment as a matter of law according to *City of Los Angeles v. Heller* because a municipality cannot not be held liable under Section 1983 where no constitutional deprivation occurred. 475 U.S. 796 (1986). Bexar County further contends that according to *Monell v. New York City Dept. of Social Science*, Plaintiffs have failed to demonstrate a custom or policy of Bexar County that was the moving force behind the alleged injuries. 436 U.S. 658 (1978).

Standard of Review

Summary judgment is appropriate if the evidence shows there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996); *Int'l Shortstop Inc. v. Rally Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991). In the summary judgment process, both movants and non-movants bear burdens of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The movant with the burden of proof at trial must establish every essential element of its claim or affirmative defense. *Id.* at 322. In so doing, the moving party without the burden of proof need only point to the absence of evidence on an essential element of the non-movant's claims or affirmative defenses. *Id.*

At that point, the burden shifts to the non-moving party to "produce evidence in support of its

claims or affirmative defenses." *Id.* at 324. The non-moving party must produce "specific facts" showing a genuine issue for trial and not mere general allegations. Fed. R. Civ. P. 56(e); *Tubacex v. M/V Risan,* 45 F.3d 951, 954 (5th Cir. 1995); *Ray v. Tandem Computers, Inc.,* 63 F.3d 429, 433 (5th Cir. 1995). It is important to note that "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the non-movant's burden." *Wallace v. Tex. Tech. Univ.,* 80 F.3d 1042, 1047 (5th Cir. 1996).

In deciding whether to grant summary judgment, the Court should view the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party. Thus, the Court construes all facts and inferences in the light most favorable to the non-moving party. *Richter v. Merchs. Fast Motor Lines, Inc.,* 83 F.3d 96, 98 (5th Cir. 1996).

The Fifth Circuit has concluded "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the evidence before the court." *James v. Saudler,* 909 F.2d 834, 837 (5th Cir. 1990) (citing *Matsushita Electrical Indus. Co., v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)). To the extent facts are undisputed, a Court may resolve the case as a matter of law. *Blackwell v. Barton,* 34 F.3d 298, 301 (5th Cir. 1994).

Analysis

Bexar County cannot be held liable under Section 1983 where no constitutional depravation has occurred. *Heller,* 475 U.S. at 799 (holding that "[i]f a person has suffered non constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point") (emphasis in original). Furthermore, because there was no underlying constitutional violation, the issue regarding whether Bexar Conty [sic] was the moving force behind the violation becomes moot. *Flores v. Sanchez,* 2005 U.S. Dist. LEXIS 15417, at *30 (W.D. Tex. July 29, 2005); *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658 (1978).

Bexar County asserts that because its employee deputy did not violate a clearly established constitutional or federal right it cannot be held liable under Section 1983. Bexar County also argues that although municipalities can be held liable under section 1983, it is not subject to vicarious or *respondeat superior* liability for the actions of its law enforcement or emergency responders. Instead, municipal liability under Section 1983 can only arise when the harm occurred as a result of an official policy or custom, which was the moving force behind the constitutional violation.

In order to properly state a Section 1983 claim against Bexar County, Plaintiffs must identify (1) an

official policy or custom (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of a constitutional right. *Palmer v. City of San Antonio*, 810 F.2d 514, 516 (5th Cir. 1987) (quoting *Grandstaff v. City of Borger*, 767 F.2d 161, 169 (5th Cir. 1987)). Unless an employee acts pursuant to an official policy or custom, municipalities are not liable for the constitutional torts of their employees. *Monell*, 436 U.S. at 663 n.7 (1978) (stating the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under Section 1983 for the constitutional torts of their employees).

"To support a claim based upon the existence of an official custom or policy, the Plaintiff must plead facts which show that: 1) a policy or custom existed; 2) the governmental policy makers actually or constructively knew of its existence; 3) a constitutional violation occurred; and 4) the custom or policy served as the moving force behind the violation." *Meadowbriar Home for Children, Inc. v. G.B. Gunn*, 81 F.3d 521, 532-33 (5th Cir. 1996) (citing *Palmer*, 810 F.2d at 516).

Plaintiffs must allege sufficient facts to show that Bexar County, through its policy makers, created or had constructive knowledge of an official policy that sanctioned or encouraged a deprivation of rights protected by the Constitution. *See Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984). Official policy is:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

Id.

Fifth Circuit precedent has consistently held that there can be no award of damages against a municipal corporation based on the actions of one of its officers when the officer inflicted no constitutional harm. *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 426 (5th Cir. 2006); *Alpha v. Hooper*, 440 F.3d 670, 672 (5th Cir. 2006); *Mace v. City of Palestine*, 333 F.3d 621, 625 (5th Cir. 2003); *Saenz v. Heldenfels Bros., Inc.* 183 F.3d 389, 392 (5th Cir. 1999). In a previous Order, this Court examined whether Deputy Coleman's actions amounted to a violation of a clearly

established constitutional right, the first prong under qualified immunity. *See* Docket No. 46. After an extensive analysis the Court found guidance in *Salas v. Carpenter,* 980 F.2d 299, 306 (5th Cir. 1992), and ruled that the a constitutional depravation or denial of a federal right had not occurred. The Court stated:

> Applying these principles, the Hales have failed to state a due process claim. Coleman neither caused the derailment, nor did anything to affirmatively exacerbated [sic] the danger. Further, he provided for the Hales to be rescued by SAFD. Thus, this case is similar to *Salas,* where the sheriff exercised his authority to replace one rescue effort with another. Despite their horrifying experience, the Hales simply have not alleged any facts indicating egregious official conduct or an abuse of authority with the intent to injure. The Fourteenth Amendment does not punish negligence committed by law enforcement officers responding to an emergency in a dangerous environment and on the basis of uncertain information.
>
> The Hales purport to bring an equal protection claim, but their Complaint is devoid of any supporting factual allegations or legal authority. The equal protection clause generally requires the government to treat similarly situated people alike.[1] This Court

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[1] *Rolf v. City of San Antonio,* 77 F.3d 823, 828 (5th Cir. 1996).

> may conduct an equal protection analysis "only if the challenged government action classifies or distinguishes between two or more relevant groups."[2] The Hales, however, do not allege that Coleman treated them differently from other individuals, nor that they are members of a suspect class, nor that Coleman purposefully discriminated against them or sought to prevent them from exercising a fundamental right.[3] Accordingly, the Hales have not stated a clearly established violation of their equal protection rights.
>
> This Court does not doubt that the Hales suffered physical injury and agony from the unfortunate events of June 28, 2004. Further, the Court expresses no opinion concerning whether Coleman properly handled the situation. Nonetheless, the Hales have not carried their burden to state a claim against Coleman for the violation of a clearly established constitutional or federal statutory right. Because Coleman is entitled to qualified immunity, his Motion to Dismiss must be GRANTED. . . .

Docket No. 46 at 11-12. Regarding the firefighters claims, the Court stated:

> [T]he Court is of the opinion that the firefighters have failed to state a due process claim. . . .

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[2] *Id.*

[3] *See DeShaney*, 489 U.S. at 197 n.3.

> In sum, the firefighters have not carried their burden to state a claim against Coleman for the violation of a clearly established constitutional or federal statutory right. Coleman is entitled to qualified immunity, and his motion to dismiss must be GRANTED,

Id. at 12-13. Based on this Court's previous findings, and Fifth Circuit precedent that requires the existence of a constitutional depravation before municipal liability can apply under Section 1983, Bexar County is not liable under Section 1983 as a matter of law. *Heller,* 475 U.S. at 799. Accordingly, Plaintiffs cannot show that Bexar County was the moving force behind Plaintiffs' constitutional rights violation because there was no underlying violation. *Monell,* 436 U.S. at 694. Therefore, Bexar County's Motion for Summary Judgment should be granted.

As an aside, the Court acknowledges that our civil servants provide an invaluable service to our communities on a daily basis. One can only imagine the difficult circumstances they encounter in the line of duty. However, it is apparent that regardless of good intentions mistakes are made from time to time.

Without expressing an opinion on whether Lt. Coleman properly handled the situation, this Court is sympathetic to Plaintiffs in this case and the experience they have endured. Clearly, there is room for improvement in the coordination and organization of rescue efforts, which fell short of the level of services and coordination county residents would

expect when faced with such a tragic scenario. Although the Court is bound by the current state of the law, and as a result Bexar County is relieved of civil liability, the Court is of the opinion that Bexar County should immediately and unerringly redevelop and reevaluate the emergency rescue efforts so a similar situation can never present itself.

Additionally, the Court commends the attorneys on both sides of this case for their thoughtful, well-reasoned briefing and first-rate oral presentations. These types of cases are difficult for all parties involved, including the lawyers on both sides and the Court. The fact remains, however, that Plaintiffs' evidence does not carry the burden in establishing municipal liability.

Conclusion

For the foregoing reasons, the Court finds that because there was no underlying constitutional violation or depravation of a federal right, Bexar County cannot be held liable under Section 1983. Furthermore, Plaintiffs have failed to establish a policy or custom that was the moving force behind a constitutional violation. Accordingly, Bexar County's Motion for Summary Judgment (Docket No. 66) is GRANTED.

It is so ORDERED.

Signed this 30th day of July, 2008.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-50820

MARY HALE; WAYNE HALE; JENNIFER HARRIS; HAROLD HARRIS; DARRELL SCRAPER

Plaintiffs-Appellants

v.

BEXAR COUNTY, TEXAS

Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas
USDC No. 5:06-CV-0562

(Filed Jul. 27, 2009)

Before REAVLEY, DAVIS, and BENAVIDES, Circuit Judges.

PER CURIAM:*

This is an appeal from a summary judgment granted in favor of Appellee Bexar County in a suit

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

stemming from a train derailment and related events that resulted in the death and injury of residents in the nearby area. Appellants – Wayne and Mary Hale (the "Hales"), residents of the area in which the train derailed, and Darrell Scraper, Harold Harris, and Jennifer Harris, members of the Southwest Volunteer Fire Department ("SWFD") – sued Bexar County and Bexar County Sheriff's Office Lieutenant Kyle Coleman ("Lt. Coleman") under 42 U.S.C. § 1983, alleging that they prevented attempted rescue efforts by volunteer rescuers which could have limited the Hales' injuries related to the train derailment. Appellants appeal the district court's grant of summary judgment in favor of Bexar County. For the following reasons, we affirm the judgment of the district court.

I.

On June 28, 2004, a train carrying chlorine gas derailed near the Hales' home of in [sic] Bexar County, outside of the city of San Antonio. The train derailment was within two-hundred yards of the home. The Hales were awakened by the sound of the derailment and the smell of the concentrated chlorine gas. Mary Hale reported the crash to a Bexar County 911 operator, who notified the Southwest Volunteer Fire Department. The incident was within the jurisdiction of SWFD and outside the city limits of the City of San Antonio. Plaintiffs Harold and Jennifer Harris, in their capacities as assistant chief and lieutenant of the SWFD, were dispatched to the scene. The Harrises reached the scene at 5:15 a.m.,

followed by deputies from the Bexar County Sheriff's Office ("BCSO") and SWFD Chief Darrell Scraper.

As they approached the scene, a BCSO patrol unit and a SWFD motor unit drove into a cloud of chlorine gas. The gas was leaking from a ruptured tank car on the train. The two lead vehicles were overcome by the chlorine gas. The sheriff's deputy was able to back his vehicle out and escape, but an injured firefighter became incapacitated and was rescued by SWFD Chief Harris. After the injured firefighter was transported for medical treatment, the SWFD rescuers put on their bunker gear and self-contained breathing apparatuses, which provided limited protection from the leaking chlorine gas, and returned to the scene. Within an hour of the derailment, the Bexar County dispatcher advised SWFD and BCSO of the chlorine gas and the wind direction. A BCSO sergeant instructed all BCSO units to stay clear of the scene.

At 6:00 a.m., Mary Hale made another call to 911, reporting that she, her husband, and her brother-in-law were having serious trouble breathing and were attempting to evacuate in their vehicle. Mary Hale informed dispatch that their access to the road was blocked by a neighbor's locked gate, which prevented them from driving their vehicle or walking to evacuate the area.

SWFD Chief Scraper arrived at the scene around 6:00 a.m. and established a forward command position, while Chief Harris retained his authority as

incident commander. San Antonio Fire Department ("SAFD") personnel began arriving on the scene and were briefed by SWFD. Around 6:15 a.m. Harris and SWFD Capt. Nolen found and rescued the train engineer, carried him east away from the wreckage for about ten minutes, and waited for a SWFD rescue vehicle. The two rescuers, still in their bunker gear, returned to the wreckage to search for the missing train conductor.

Around 6:30 a.m., SWFD was notified that nearby residents, including the Hales, were trapped at 9281 Nelson Road. SAFD and SWFD discussed options for rescuing the Hales and SWFD, equipped with bunker gear and self-contained breathing apparatuses, prepared to approach the Hales' residence through a cornfield upwind from the spill. At 7:00 a.m. Harris and Nolen further investigated the wreckage and crossed under the train on foot, heading east upwind, looking for a safe rescue approach. Chief Scraper instructed the rescuers to take their truck to initiate the rescue. Appellants allege that this attempt was thwarted by BCSO deputies who would not let SWFD move their vehicle closer to the wreckage. Appellants allege that in accordance with Bexar County's interpretation of the Bexar County Emergency Management Plan (Annexes F & Q), the mutual aid agreement among local governmental agencies, as well as National Incident Management System protocols and procedures, Bexar County determined that SAFD would be the exclusive agency to approach the accident scene and attempt a rescue,

concluding that no other rescuers would be allowed to attempt a rescue. Mary Hale was still in contact with the Bexar County dispatcher, and informed her that she and her husband were still in their vehicle trying to escape the chlorine cloud, but were unsuccessful because of the blocked road. The Hales were still having serious trouble breathing. The dispatcher maintained contact, indicated help was "on the way," and advised the Hales to return to the house and turn off the air conditioning. Returning to the house positioned the Hales closer to the chlorine spill and train derailment, and consequently, the Hales allege, exposed them to more concentrated chlorine contamination and poisoning.

Two hours after SWFD was allegedly prevented from initiating the Hales' rescue, the Hales were contacted by private rescuers by telephone. At 8:30 a.m., private rescuers informed the Hales that they were on their way to the Hales' residence from the southeast. Shortly thereafter, the private rescuers again contacted the Hales and informed them that BCSO sheriff's deputies blocked their rescue attempt. Additionally, the Hales' son Charles, who was familiar with the area and had experience as a volunteer firefighter, was also denied the opportunity to make a rescue attempt. Charles called 911 and informed the dispatcher that he could make the rescue; however, he was informed that he would be stopped if he attempted the rescue. After driving to the area, Charles could not get close enough to the house because sheriff's deputies blocked his access.

SAFD committed its HazMat teams to the incident, which began arriving at the command site at 8:30 a.m. and prepared for a tactical entry through the wreckage at approximately 9:45 a.m. to search for victims. At approximately 9:10 a.m., Bexar County 911 staff advised the Hales by telephone to get into the shower for decontamination in preparation for imminent evacuation. The Hales showered, ultimately creating a chemical reaction with the chlorine gas in the house, producing hydrochloric acid, which allegedly resulted in further harm and injury.

After SWFD's attempts to use its vehicle to make a rescue from the southeast were blocked, Chief Harris requested Lt. Harris and fireman Michael Yanelli find a way around the wreckage from the southeast to rescue the trapped residents. Lt. Harris and Yanelli drove their fire rescue truck along the county roads southwest of the wreck, searching for a way to approach the isolated segment of Nelson Road, upwind of the wreckage, and away from the chemical hot zone. The two rescuers were observed by the operator of BCSO Unit 2701, who contacted dispatch to see if BSCO [sic] had authorized any firemen to be on the back side of Nelson Road. BSCO [sic] Lt. Kyle Coleman and another deputy of the BSCO [sic] stopped Harris and Yanelli, and ordered them out of the area. Appellants allege that while in their clearly marked SWFD rescue vehicle, the two rescuers attempted to identify themselves and explain their actions, but the BSCO [sic] deputy ordered them to leave without an opportunity to show any credentials.

According to a partial transcript of BCSO radio communications prepared at the request of the National Transportation and Safety Board, at around 9:45 a.m., the operator of BSCO [sic] Unit 2701, Lt. Coleman, was advised about the SWFD presence and authority to check homes and proceed along Nelson Road. The BSCO [sic] operator of BSCO [sic] Unit 2004, Lt. Raul Fernandez, informed Lt. Coleman that the SWFD Assistant Chief had sent firemen into the back side of Nelson Road to check on some homes, and noted that "it's their call, it's the county side." Both Lt. Coleman and Lt. Fernandez were senior sheriff patrol supervisors in charge of operations at the accident. After being informed of SWFD's presence, Lt. Coleman responded "well, we just ordered them out of here, we've already took care of that, and we're not going to allow 'em back in here . . . until the fire command over there . . . tells us they can come back in." Appellants allege that the deputies were acting pursuant to an official decision to block anyone other than the SAFD HazMat team from approaching the accident scene. The Harrises and Scraper allege that Lt. Coleman, a BCSO sergeant, ordered them to stay out of the area. Similarly, the Hales allege that other private rescuers, such as their son, Charles, were prevented from attempting a rescue.

SAFD finally reached the Hales at 11:30 a.m. The Hales believe they could have been rescued as early as 7:30 a.m. if Lt. Coleman and other deputies had not interfered with SWFD. They allege that, as a result of the delay, they suffered prolonged exposure

to chlorine gas and hydrochloric acid. When SAFD arrived, Mary Hale was almost unconscious. Her brother-in-law, who was living with the Hales at the time, died a few months later. Wayne Hale's mother and step-sister, who lived next door, were dead when help arrived.

The Hales assert that their substantive due process rights under the Fourteenth Amendment were violated when Bexar County and its officials failed to allow the SWFD or other volunteer rescuers to attempt a rescue. The Harrises and Scraper contend that their constitutional rights were violated because they were wrongfully prevented from rescuing the Hales and others by Bexar County law enforcement personnel. Defendant Coleman filed a motion to dismiss on the basis that he was entitled to qualified immunity, which was granted by the district court. Bexar County subsequently moved for summary judgment on the claims asserted by Appellants in their third amended complaint. The district court granted Bexar County's motion for summary judgment, holding that Appellants had failed to allege a constitutional violation to support their claims under § 1983. The instant appeal followed.

II.

This court reviews a district court's grant of summary judgment de novo, applying the same standards as the district court. *Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802, 805 (5th Cir. 2007). Summary

judgment is proper if the record reflects "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding whether a genuine issue of material fact exists, this court must draw all reasonable inferences in favor of the responding party. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

In order to properly state a § 1983 claim against Bexar County, Appellants must identify (1) an official policy or custom (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of a constitutional right. *Palmer v. City of San Antonio,* 810 F.2d 514, 516 (5th Cir. 1987) (quoting *Grandstaff v. City of Borger,* 767 F.2d 161, 169 (5th Cir. 1987)). A "'proper analysis requires us to separate two different issues when a section 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the [municipality] is responsible for that violation.'" *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 426 (5th Cir. 2006) (quoting *Collins v. City of Harker Heights,* 503 U.S. 115, 120 (1992)). A municipality cannot be held liable under § 1983 if there is no underlying constitutional violation. *Id.*

In order to establish the existence of a constitutional violation in this case, the Hales urge that we accept the state-created danger theory and hold Bexar County liable thereunder. This Circuit has never expressly accepted the state-created danger theory that a due process violation can be found if a

state created or increased the danger to the plaintiffs and acted with deliberate indifference. *Rios,* 444 F.3d at 422-23 ("[N]either the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof. We have, however, many times refused to allow recovery sought to be predicated thereunder."); *see also Beltran v. City of El Paso,* 367 F.3d 299, 307 (5th Cir. 2004) ("This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability"); *Morin v. Moore,* 309 F.3d 316, 321-24 (5th Cir. 2002); *McKinney v. Irving Indep. Sch. Dist.,* 309 F.3d 308, 313-14 (5th Cir. 2002).

In *Salas v. Carpenter,* 980 F.2d 299 (5th Cir. 1992), involving a § 1983 suit brought by the estate of a slain hostage against the county sheriff who commanded hostage rescue efforts, we refused to find a constitutional violation on the basis of the state-created danger theory, or otherwise, in the context of a failed rescue effort. In *Salas,* the plaintiff claimed that the county sheriff deprived the victim of her life by preventing city officials from coming to her aid, using incompetent hostage negotiators, and failing to provide adequate equipment to handle the hostage situation. *Salas,* 980 F.2d at 303. After determining that the plaintiff had not alleged a constitutional violation, this court found that the sheriff was entitled to qualified immunity from suit. *Id.*

In considering the claim in *Salas,* we recognized that some other Circuits had found "a denial of due process when the state creates the . . . dangers" faced

by an individual. *Id.* at 309. We also noted a Seventh Circuit case which held that a drowning victim had stated a claim under the due process clause when a deputy acting pursuant to county policy committed a constitutional tort by "cutting off private avenues of life saving rescue without providing an alternative." *Id.* at 308 (citing *Ross v. United States,* 910 F.2d 1422, 1433 (7th Cir. 1990)). After considering these potential theories, we held that the plaintiff had not alleged a constitutional violation, because despite the fact that the sheriff dismissed the city police officers who were attempting to aid the victim, the sheriff's deputies were at the same time securing the courthouse and commencing negotiations with the hostage-taker. *Salas,* 980 F.2d at 308. We held that the facts presented in *Salas* were unlike the situation in *Ross* because the sheriff had provided a "meaningful alternative" to the rescue efforts that were prevented. *Id.* ("[I]n *Ross,* no effort was made to rescue a drowning boy for thirty minutes. In contrast, at the time Carpenter dismissed the police his deputies were present and negotiating with Cabano. Carpenter did not use his authority as a state officer to prevent any rescue, rather he exercised his authority to replace one rescue effort with another.").

In addition, we noted that a state's failure to protect a person can amount to a constitutional violation only if the state had a duty to act. *Id.* at 308-09 (citing *DeShaney v. Winnebago Cty. Dep't of Social Servs.,* 489 U.S. 189 (1989)). After noting that some settings create a special relationship between the

state and a person – i.e., the person is held in state custody or otherwise prevented by the state from caring for herself – imposing a duty to protect the person, this court in *Salas* noted that a failed rescue effort did not present that type of circumstance. *Id.* The court further stated that even if this Circuit accepted the law of other Circuits which have found constitutional violations when the state created the danger, the sheriff had continued at all times to supervise a law enforcement effort to secure the victim's safe release, and thus the situation did not qualify as a state-created danger because the official did not "fail[ ] to take any action to alleviate the danger which they created or aggravated." *Id.* at 309.

Like those in *Salas,* the Hales' claims do not allege a constitutional violation for the purposes of § 1983. Even assuming that the prevention of all rescues without providing an alternative presents a valid due process claim in this Circuit, those are not the circumstances presented here. Although Appellants have presented evidence that Coleman prevented the SWFD volunteer firefighters from entering the area, he did provide for the eventual rescue of the Hales by the SAFD. Because Bexar County and Coleman provided a meaningful (though delayed) rescue alternative to the prevented private rescue effort, his actions did not violate the Hales' due process rights. Furthermore, Bexar County can only be held liable if the Hales have asserted that its officials had a duty to act. We have held that preventing a rescue effort does not, in and of itself, create a special

relationship between the state and a person imposing a duty to protect the person. *Salas,* 980 F.2d at 308.

Even if the state-created danger theory was explicitly recognized in this Circuit, it would not apply here for the same reasons expressed in *Salas.* In *Salas,* this court held that the defendant sheriff could not be held liable under the theory because he neither created the immediate risk of danger to the hostage nor did he abandon the victim in the face of the danger presented. 980 F.2d at 309. Certainly Lt. Coleman did not create the immediate danger of the chlorine gas coming from the derailed train. Even if the rule encompassed a claim based upon the increase of a "person's vulnerability to private violence by interfer[ence] with protective services which otherwise would be available," *Salas,* 980 F.2d at 308 (citing *Freeman v. Ferguson,* 911 F.2d 52 (8th Cir. 1990)), it would not apply here. Although Coleman excluded the volunteer firefighters, the SAFD – the firefighters Coleman thought were authorized to attempt the rescue – did eventually rescue the Hales and thus he cannot be characterized as "failing to take any action to alleviate the danger." *Id.* at. 309. Because there is no applicable precedent to support the existence of the violation of a constitutional right under these circumstances, the district court did not

err in granting summary judgment on the Hales' § 1983 claims.[1]

The Harrises and Scraper, members of the SWFD who attempted to rescue the Hales, also assert that the district court erred in granting summary judgment in favor of Bexar County on the grounds that they failed to assert a constitutional violation or deprivation to sustain their claims under § 1983. The Harrises and Scraper assert that their rights under both the Fourteenth and First amendments were violated when they were prevented by Bexar County officials from rescuing the Hales.[2]

As our sister Circuits have observed, there is no constitutionally cognizable interest in a volunteer position. *See Versarge v. Township of Clinton N.J.*, 984 F.2d 1359, 1370 (3d. Cir. 1993) (holding that volunteer firefighter had no due process interest in his position despite the fact that he received benefits); *Hyland v. Wonder,* 972 F.2d 1129, 1140-42 (9th Cir. 1992) (holding that the litigant had no protected

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[1] Because the Hales have failed to allege a constitutional violation, we need not address the issue of whether they properly alleged that Bexar County had an official policy which was the moving force behind any such violation. *See Rios,* 444 F.3d at 426.

[2] Although Appellants mention the First Amendment in their brief, they do not provide any arguments concerning a First Amendment violation or cite any authorities to support such an argument. Accordingly, this argument has been waived. *See United States v. Edwards,* 303 F.3d 606, 647 (5th Cir. 2002) (inadequately briefed arguments are waived).

property interest in or legal entitlement to his volunteer position). Although those cases involved litigants who were terminated from their positions, and not those who were prevented from performing in their volunteer capacity, they support the conclusion that the Harrises and Scraper do not have a due process right to serve as volunteer firefighters.

The Harrises and Scraper also allege that they suffered an equal protection violation when they were denied access to the Hales. Because the SWFD are not members of a protected class, any equal protection violation is evaluated under the rational basis standard.[3] *Reid v. Rolling Fork Pub. Util. Dist.*, 854 F.2d 751, 753 (5th Cir. 1988) ("Since this case does not concern a suspect or quasi-suspect classification such as race or sex to which heightened scrutiny is given, the equal protection clause requires only a minimum degree of rationality."). An equal protection violation does not arise if there is any basis for a classification or official action that bears a debatably rational relationship to a conceivably legitimate governmental end. *Id.*; *see also Stefanoff v. Hays County, Tex.*, 54 F.3d 523, 526 (5th Cir. 1998) ("[E]qual protection rights are not violated as long as the policy is rationally related to some legitimate governmental goal."). Although neither party addressed the issue of whether Coleman or Bexar County had a rational basis for

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[3] Appellants do not assert in their brief, nor did they assert at trial, that they are part of a suspect class.

excluding the volunteer SWFD firefighters while allowing the professional SAFD firefighters to enter, it is evident that under the circumstances presented here, excluding volunteers, however highly trained, in a dangerous emergency situation is a conceivably legitimate government goal.

III.

Because Appellants failed to allege a violation or deprivation of their constitutional rights, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-50820

MARY HALE; WAYNE HALE;
JENNIFER HARRIS; HAROLD HARRIS;
DARRELL SCRAPER

Plaintiffs-Appellants

v.

BEXAR COUNTY, TEXAS

Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas, San Antonio

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ON PETITION FOR REHEARING EN BANC

(Filed Aug. 24, 2009)

(Opinion ___ 5 Cir., ___, ___ F.3d ___)

Before REAVLEY, DAVIS, and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge